

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

R. ALEXANDER ACOSTA, Secretary of Labor,)	CIVIL CASE NO. 5:15-cv-01577
United States Department of Labor,)	
)	JUDGE BENITA Y. PEARSON
Plaintiff,)	
)	<u>DEFENDANTS/APPELLANTS'</u>
-vs-)	<u>PETITION FOR COSTS AND</u>
)	<u>ATTORNEY FEES UNDER THE</u>
CATHEDRAL BUFFET, INC., and)	<u>EQUAL ACCESS TO JUSTICE</u>
ERNEST ANGLEY,)	<u>ACT.</u>
)	
Defendants.)	

Now come the Defendant/Appellants, Cathedral Buffet, Inc. and Reverend Ernest Angley, by and through the undersigned counsel, and hereby submit their petition for an award of costs and attorney fees under the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. § 2412.

1. The Defendant/Appellants are the prevailing parties within the meaning of the EAJA. See attached Brief in Support.
2. The Defendant/Appellant Ernest Angley had a net worth of less than \$2,000,000 at the time the DOL filed its civil action, qualifying him for relief under the EAJA. See the Affidavit of Reverend Ernest Angley regarding his individual net worth attached hereto as Exhibit "A" and incorporated herein.
3. Defendant/Appellant Cathedral Buffet, Inc. had a net worth that did not exceed \$7,000,000 at the time the DOL filed its civil action, and had fewer than 500 employees at the time the DOL filed its civil action, qualifying it for relief under the EAJA. See

Affidavit of Catherine Shupe regarding the net worth of the Cathedral Buffet, Inc. attached hereto as Exhibit “B” and incorporated herein.

4. Based on their prevailing party status, the Defendants/Appellants are entitled to recover their court costs in this action pursuant to 28 U.S.C. § 2412(a) of the EAJA. A completed Bill of Costs for the District Court proceedings is attached to the Affidavit of William G. Chris, Exhibit “E” as its Exhibit “E-5”. The Bill of Costs demonstrates court costs incurred by the Defendants/Appellants in the District Court for the Northern District of Ohio and will be filed with the District Court when it enters judgment on remand. A Bill of Costs as filed in the Sixth Circuit Court of Appeals in relation to the appellate proceedings is attached hereto as Exhibit “C.” The Bill of Costs demonstrates court costs incurred by the Defendants/Appellants in the Sixth Circuit Court of Appeals and was filed with the Sixth Circuit Court of Appeals on April 30, 2018 pursuant to Fed.R.App.P. 39, 6th Cir.R. 39 and 6th Cir. I.O.P. 39. Transcript costs are requested to be taxed on both the Appellate Court and District Court Bill of Costs, but Defendants/Appellants are not seeking a double recovery. Prior to filing, the Bill of Costs to be filed in the District Court on Remand, which is attached as Exhibit “E-5” to the Affidavit or William G. Chris will be amended if the transcript costs are taxed at the appellate level as indicated on the mandate.
5. As conclusively demonstrated by the recent decision issued by a unanimous panel of the Sixth Circuit Court of Appeals, a true and accurate copy of which is attached as Exhibit “D” and incorporated herein, and as further demonstrated by the DOL’s unreasonable legal and factual grounds to pursue its claims and unfair and unreasonable litigation

tactics discussed in the accompanying Brief in Support, the DOL's position in its enforcement action against the Defendants/Appellants was not substantially justified, entitling the Defendants/Appellants to an award of attorney fees and expenses as specified in 28 U.S.C. § 2412(d)(1)(A). See attached Brief in Support.

6. As demonstrated by the attached Affidavit of William G. Chris that is attached hereto and incorporated herein as Exhibit "E" and the recent decision issued by a unanimous panel of the Sixth Circuit Court of Appeals attached as Exhibit "D," the DOL's demand in the civil action (\$388,507) was substantially in excess of the judgment finally obtained by the DOL (\$0) and was unreasonable when compared with such judgment, under the facts and circumstances of the case. See 28 U.S.C. § 2412(d)(1)(D) and the attached Brief in Support.
7. There exist no special circumstances which would make an award against the DOL unjust in this case. See attached Brief in Support.
8. The attorneys and paralegals representing the Defendants/Appellants spent at total of 858.7 hours defending the Defendants/Appellants at the District Court level. See Time Summary and Fee Calculation for the proceedings in the District Court and the Sixth Circuit Court of Appeals attached to Exhibit "E" (the Affidavit of William G. Chris) as its Exhibits "E-1" (district court all months), "E-2" (monthly breakdown by attorney/paralegal), which are incorporated herein.
9. The attorneys representing the Defendants/Appellants billed them at a rate of \$225 per hour for work performed defending against the DOL complaint at the District Court level.

See the Affidavit of William G. Chris, attached as Exhibit “E” and its Exhibits “E-1” and “E-2,” which are incorporated herein.

10. Attorneys William G. Chris, Lawrence R. Bach and Todd A. Mazzola all have practiced as licensed attorneys in the State of Ohio in excess of 20 years, are experienced in labor and employment litigation, and the rate of \$225 per hour charged is at or below their regularly-charged hourly rates for the time-period(s) in question. See Affidavits of William G. Chris, Todd A. Mazzola and Lawrence R. Bach, attached as Exhibits “E”, “F”, and “G”, respectively and incorporated herein.
11. Brandon T. Pauley is a former associate of Roderick Linton Belfance, LLP, who has strong business background and experience through his employment prior to attending law school and who has gained an excellent reputation in the community through his successes in litigation, including a recent successful appeal to the Supreme Court of Ohio. Brenda S. Schwartz is a Partner at Roderick Linton Belfance, LLP and was a former partner at Buckingham Doolittle & Burroughs. She has over 20 years of experience in private practice. See Affidavit of William G. Chris attached as “Exhibit E”
12. The \$225 hourly rate charged for attorney services is commensurate with the rate charged by attorneys of similar skill, experience and reputation in the relevant market in connection with the litigation of labor and employment litigation. See Declaration of Ronald S. Kopp, and Affidavits of William G. Chris, Todd A. Mazzola and Lawrence R. Bach, attached as Exhibits “H,” “E”, “F”, and “G”, respectively and incorporated herein.

13. Tyler Blair is a former paralegal with Roderick Linton Belfance, LLP. Mr. Blair had obtained his Juris Doctor degree from The Ohio State University, Moritz College of Law and was awaiting the results of his bar examination at the time he performed services for the clients. Mr. Blair has since become an attorney with the Judge Advocate General's Corps. See Affidavit of William G. Chris attached as "Exhibit E." Fees expended for paralegal services may be awarded under the EAJA at market rates. See *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 577 (2008). Mr. Blair's time was billed to the clients at \$60 per hour, which was below the market rate for paralegals in the relevant market area at the time the services were rendered. See Affidavit of William G. Chris attached as "Exhibit E."
14. The hours expended and fees and expenses charged in litigating the case filed against the Defendants/Appellants by the Department of Labor were reasonable. See Declaration of Ronald Kopp, attached as Exhibit "H" and incorporated herein.
15. The attorneys representing the Defendants/Appellants spent at total of 140.8 hours prosecuting the Defendants/Appellants' successful appeal to the Sixth Circuit Court of Appeals. See Time Summary for the proceedings in the Sixth Circuit Court of Appeals attached to Exhibit "E" (the Affidavit of William G. Chris) as its Exhibit "E-3," which is incorporated herein.
16. The attorneys representing the Defendants/Appellants were paid a flat fee of \$15,000.00 for all of their work on the appeal. See the Affidavit of William G. Chris, attached as Exhibit "E" and its Exhibit "E-4," which is incorporated herein.

17. The attorneys representing the Defendants/Appellants were paid an effective hourly rate of \$106.63 per hour for the appeal, considering the fee paid divided by the hours worked. See Time Summary for the proceedings in the Sixth Circuit Court of Appeals attached to Exhibit “E” (the Affidavit of William G. Chris) as its Exhibit “E-3,” which is incorporated herein.
18. The hours expended on the appeal were reasonable and reasonably justified the \$15,000.00 flat fee. See Declaration of Ronald Kopp, attached as Exhibit “H” and incorporated herein.
19. The attorneys representing the Defendants/Appellants obtained excellent results in the litigation.
20. Employing the formula set forth by the Ninth Circuit Court of Appeals in *Sorenson v. Mink*, 239 F.3d 1140, 1148 (9th Cir. 2001) to calculate the cost of living adjustment permitted pursuant to 28 U.S.C. § 2412(d)(2)(A) and utilizing the Consumer Price Index for all consumers, the calculation yields a rate of \$201.14 per hour:
$$(\text{Statutory Cap of } \$125 \times \text{Present CPI-U April of 2018} = 250.546) / (\text{March 1996 Baseline CPI-U of } 155.7) = \text{Adjusted Hourly Rate of } \$201.1448298.$$
 Compare *Jawad v. Barnhart*, 370 F. Supp. 2d 1077, 1080 (S.D. Cal. 2005); *Steele v. Comm'r of Soc. Sec.*, 989 F. Supp. 2d 686, 689 (S.D. Ohio 2013). The same amount appears as a product when using the online calculator located at: https://www.bls.gov/data/inflation_calculator.htm
See Affidavit of Todd A. Mazzola attached as Exhibit “F” and its Exhibit “F-2,” incorporated herein.

21. The “Economics of Law Practice in Ohio in 2013” published by the Ohio State Bar Association represents that five years ago, when the publication issued, the average hourly rate for all attorneys in private practice in the state of Ohio was \$233 per hour and, the average billing rate for attorneys with 11-20 years of experience was \$263 per hour and between 21 and 50 years of experience was \$254 per hour, and the average hourly rate for an attorney in Akron was \$220 per hour. (Ex. 46, p. 39). The state-wide average rate for attorneys primarily practicing in the field of labor law was \$231 per hour and in the field of employment law was \$313 per hour. For attorneys in trial practice, the average rate was \$275 per hour (Ex. 47, p. 40). See Affidavit of Todd A. Mazzola attached as Exhibit “F” and its Exhibit “F-1,” incorporated herein.
22. Defendants/Appellants petition this Court to grant attorney fees at an hourly rate of \$225 for attorney work performed at the District Court for a total of \$168,234.75
23. Defendants/Appellants request this Court to grant attorney fees of \$15,000 for the attorney work performed at the Sixth Circuit Court of Appeals.
24. A fee applicant is also entitled to attorney fees incurred in preparation and defense of the fee application itself. See *Comm'r, I.N.S. v. Jean*, 496 U.S. 154 (1990).
25. To date, the Defendants/Appellants have incurred fees in the amount of \$9,405.00 in preparing the fee petition, consisting of 41.8 hours in research and writing and gathering the materials necessary to support the petition at a rate of \$225 per hour. See Time Summary and Fee Calculation for the Fee Petition attached to Exhibit “E” (the Affidavit of William G. Chris) as its Exhibit “E-6” and incorporated herein. It is anticipated that Defendants/Appellants will continue to incur fees if the DOL challenges this fee petition,

and the Defendants/Appellants therefore reserve the right to supplement this fee petition accordingly.

26. The Defendants/Appellants have also incurred attorney expenses including travel, lodging and meals in the total amount of \$1,092.97, which may be awarded under 28 U.S.C. § 2412(d). See Expense Summary attached to Exhibit “E” (the Affidavit of William G. Chris) as its Exhibit “E-7” (district court) and “E-8” (appeal) incorporated herein, breaking down these expenses.
27. Pursuant to the authority set forth in 28 U.S.C. § 2412(a)-(d), Defendants/Appellants request a total of \$197,638.19 in costs, fees and expenses against the DOL under the EAJA, subject to future modification if the DOL contests this Petition or commences a motion for rehearing with this Court or requests certiorari in the Supreme Court of the United States.
28. This Petition is more fully supported by the attached Brief in Support and the supporting documents, including Exhibit “A” (the Affidavit of Reverend Ernest Angley), Exhibit “B” (the Affidavit of Catherine Shupe), Exhibit “C” (the Bill of Costs as filed in the Sixth Circuit Court of Appeals), Exhibit “D” (the April 16, 2018 decision of the Sixth Circuit Court of Appeals); Exhibit “E” (the Affidavit of William G. Chris and its sub-exhibits “E-1” through “E-8”), Exhibit “F” (the Affidavit of Todd A. Mazzola and its sub-exhibits “F-1” through “F-4”), Exhibit “G” (the Affidavit of Lawrence R. Bach), Exhibit “H” (the Declaration of Ronald S. Kopp and its sub-exhibit “H-1”) as well as all of the trial transcripts and trial exhibits that have been filed in the court proceedings, which are fully incorporated herein by reference.

WHEREFORE, Defendants-Appellants, hereby make application to the Court for an award of attorney fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412.

Respectfully submitted,

RODERICK LINTON BELFANCE, LLP

/s/William G. Chris

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ATTORNEYS FOR DEFENDANTS
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018 a copy of the foregoing Defendants/Appellants' Petition for Costs and Attorney Fees Under the Equal Access to Justice Act was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/William G. Chris

William G. Chris (0006593)